No. 79-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

BUREN JACKSON BRADSHAW
RUFUS WALLINGFORD
JERRY E. SMITH
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, Texas 77002

KEITH A. JONES
Fulbright & Jaworski
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-552

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

The petition for a writ of certiorari presents the question whether the Act of State Doctrine permits a court of the United States to inquire into the conduct of a foreign government for the purpose of determining the actual reasons and motives for official acts. Respondents apparently concede that the Act of State Doctrine bars such inquiry, for in their brief in opposition they avoid any discussion of the merits. Instead, respondents argue (1) that the question presented in the petition is not actually raised by this case, Br. in Opp. at 6-13, and (2) that the decision below does not create a conflict among the courts of appeals, Br. in Opp. at 13-15. This reply memorandum is submitted to address these two arguments, neither of which has any merit.

1. Although for obvious tactical reasons respondents choose to characterize them as "complex," Br. in Opp. at 7, the essential facts of this case actually are quite simple. In 1970, respondents entered into a joint venture agreement with Telaga Mas for the conduct of a logging business. Pet. App. A, at 4a. In 1971, the Indonesian government entered

into a forestry agreement with the joint venturers. *Id.* The government subsequently cancelled the forestry agreement. *Id.* at 6a. Cancellation of the forestry agreement "automatically terminate[d] any rights of the parties to conduct lumbering operations." *Id.* at 5a.

In this lawsuit, respondents contend that their joint venture with Telaga Mas somehow was "destroyed" by petitioners even before the Indonesian government cancelled the forestry agreement. Br. in Opp. at 5. This contention, however, is erroneous as a matter of law: The joint venture agreement remained valid and enforceable under Indonesian law long after the government had cancelled the forestry agreement. Pet. App. A, at 6a; Pet. App. B, at 21a. In other words, the joint venture itself was not destroyed; what was destroyed was the joint venture's economic viability. And that was destroyed not by petitioners but by operation of law, *i.e.*, by the Indonesian government's cancellation of the forestry agreement, its refusal to re-enter such an agreement, and its determination not to issue a cutting license and logging concession. It therefore is plain that foreign acts of state lie at the heart of this case.

For purposes of the application of the Act of State Doctrine, however, the case really is no different even if one takes at face value respondents' contention that petitioners destroyed the joint venture. The difficulty for respondents is that the joint venture had no value apart from the profits that allegedly would have been derived from its operation of the proposed logging business. See Pet. at 9 n. 8. And as the court of appeals recognized, in order to recover for such alleged lost profits, "[respondents] must show a causal relationship between [petitioners'] anticompetitive actions and the harm suffered." Pet. App. A, at 16a. In other words, respondents must show that *but for* petitioners' alleged conspiracy the Indonesian government

would have honored the forestry agreement and issued the cutting license and logging concession, because it is undisputed that no trees could have been cut, nor profits derived, absent these required, discretionary, governmental approvals.

As a practical matter, what this means is that at trial respondents would be required not only to show why the Indonesian government cancelled the forestry agreement and refused to issue the license and concession, but also to show what the government would have done with respect to the joint venture in the absence of petitioners' alleged conspiracy. As the court of appeals understood, such a showing would entail "inquiry into the motivation behind or circumstances surrounding the sovereign act." *Id.*

Respondents here attempt to suggest that no such inquiry even is necessary. The respondents would have this Court accept as proven, or established, the motivation of the Indonesian government as merely alleged by respondents, *i.e.*, that the failure or refusal of that government to grant the required discretionary approvals was indeed caused by petitioners' alleged acts. But this is a factual issue that would have to be adjudicated in this case. The district court cannot simply accept without proof respondents' allegation that the Indonesian government was motivated in a certain way.[1]

---

[1] It follows that respondents' "taxicab analogy," Br. in Opp. at 7-8, is inapt: That analogy assumes the very factual issue that would have to be adjudicated here, *i.e.*, whether the governmental action was motivated by the defendant's acts. It may be that the process of reviewing applications for drivers' licenses is so routine and ministerial that, in the hypothetical offered by respondents, the agency's motivation could safely be assumed. In the instant case, however, the license to harvest a vast tract of forest land depended on the making of *discretionary* decisions by various high governmental officials in the implementation of national policy regarding the exploitation of cherished state-owned forest reserves. *See* Pet. App. A, at 3a-4a; Pet. App. B, at 24a.

Recognizing that judicial inquiry into the reasons and motives underlying the Indonesian government's acts was in prospect, the court below nevertheless explicitly rejected petitioners' argument that such an inquiry would be barred by the Act of State Doctrine.[2] Instead, the court explicitly ordered that upon remand respondents must be allowed to "question [the Indonesian] government's motivation to the extent of measuring [their] damage." Pet. App. A, at 17a. It is plain, therefore, that this case directly raises the question presented in the petition, *i.e.*, whether the Act of State Doctrine permits a court of the United States to inquire into the conduct of a foreign government for the purpose of determining the actual reasons and motives for official acts.[3]

Under facts closely analogous to those here, the district court in Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977), dismissed on act-of-state grounds an antitrust case charging defendant with causing the denial of an import license sought by plaintiff:

> ". . . [T]his Court cannot see how the case at bar can be resolved without an inquiry into why the Brazilian government acted as it did in denying the licenses. Such an inquiry would necessarily have to include the question of whether Grumman, directly or indirectly, improperly influenced that decision. The answer to that question easily might 'embarrass the Executive Branch of our Government in the conduct of our foreign relations.' *Dunhill, supra,* 425 U.S. at 697. . . . For this reason this case is within the act of state doctrine and is non-justiciable.

432 F. Supp. at 333.

[2] Acknowledging that the Act of State Doctrine bars inquiry into the validity of a foreign sovereign act (*see, e.g.*, Pet. App. A, at 7a n. 6), the court "disagree[d] that motivation and validity are equally protected by the act of state rubric." *Id.* at 16a. The decision below thus squarely rests upon the distinction between motivation and validity, a distinction that respondents accurately characterize as merely "semantic." Br. in Opp. at 11.

[3] Respondents argue that the mere allegation that violations of United States law occurred within the United States renders the Act of State Doctrine inoperative (Br. in Opp. at 11-12). This argument is in direct conflict with Hunt v. Mobil Oil Co., 550 F.2d 68 (2d Cir.), *cert. denied,* 432 U.S. 904 (1977), where

Notwithstanding respondents' suggestion to the contrary, Br. in Opp. at 15-16, this is the most appropriate point in the lawsuit for consideration and definitive resolution of this question.[4] If this Court does not intervene, the district court will be forced to determine the Indonesian government's motivation and thereby risk an affront to the foreign sovereign, and the interference with foreign affairs, that the Act of State Doctrine is designed to avoid.

2. It was pointed out in the petition that the decision below conflicts with both *Hunt* v. *Mobil Oil Co.* and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 461 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). Respondents apparently concede the conflict with *Occidental Petroleum*, arguing only that there is no conflict with *Hunt*. But the decision below plainly conflicts with *Hunt* as well.

It is remarkable that respondents find no conflict between the decision below and *Hunt*, for the Fifth Circuit's re-

---

the Act of State Doctrine was held to apply even though many of the alleged conspiratorial acts took place within the United States. *See* 550 F.2d at 71.

Respondents' argument that the Indonesian government's initial entry into the forestry agreement was not a sovereign act, Br. in Opp. at 12-13, is both incorrect and irrelevant. The forestry agreement represented a noncommercial determination by the government concerning the extent to which a valuable, depletable natural resource could be privately exploited. *See* Pet. at 11 n. 14. In any event, the acts of state at issue here are the Indonesian government's cancellation of the forestry agreement, its refusal to re-enter such an agreement with the joint venturers, and its determination not to issue a logging concession and cutting license. *See* Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. at 334.

[4] Contrary to the assertions of respondents (Br. in Opp. at 16), a ruling by this Court upholding the Act of State defense *would* be dispositive of this litigation, for the district court has already exercised its discretion to dismiss the pendent claims. *See* Pet. App. B, at 19a; Pet. App. A, at 2a. There is no diversity jurisdiction in this case, since there is an alien on each side of the controversy. 1 Moore's Federal Practice ¶ 0.75 [1. — 2] at 709.6 (2d ed. 1972).

pudiation of *Hunt* is explicit and dispositive on the very point upon which this petition turns, *i.e.*, whether an American court can determine the reasons and motives underlying foreign official acts. In denouncing *Hunt*, the court below stated, "[W]e disagree that motivation and validity are equally protected by the act of state rubric." Pet. App. A, at 16a. Hence, issue is joined between the Second and Fifth Circuits on a legal question of international significance. This Court should resolve that conflict.[5]

Respondents offer three purported distinctions between this case and *Hunt*. First, respondents argue that whereas in *Hunt* the inquiry into motivation would have been made to determine the "fact of damage," here the inquiry will be made only to establish the measure of damages. Br. in Opp. at 14. Even if this were true,[6] it would be a distinction without a difference. The purpose of the Act of State Doctrine is to guard against embarrassment of foreign sovereigns and interference with the conduct of foreign policy. That purpose is frustrated by any judicial inquiry into the motives underlying a foreign official act. It is the *fact* of the inquiry, not the *reason* for it, that implicates the Act of State Doctrine.

Second, respondents argue that *Hunt* did not "involve an injury caused by the independent acts of private parties." Br. in Opp. at 14.[7] That proffered distinction is rebutted by Hunt's own submission to this Court:

---

[5] On the related question of establishing liability, the court below was equally explicit in its rejection of *Hunt*: "We do not agree that in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's [*sic*] acts were the sole cause of the injury." Pet. App. A, at 16a.

[6] Respondents' argument is based upon the shaky assumption that respondents can show injury apart from a loss of profits from the proposed logging business. *See* pp. 2-3, *supra*.

[7] Respondents also incorrectly state that *Hunt* involved no allegation of misconduct within the United States. *See* n. 3, *supra*.

> The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises that were made to be broken. *They damaged Hunt wholly apart from the nationalization* . . . .

Petition for a Writ of Certiorari in *Hunt*, at 24-25 (No. 76-1403) (emphasis added). *See also* Pet. at 9 n. 9.

Third, respondents rely upon the fact that *Hunt* involved nationalization rather than, as here, exclusion of a firm from the national marketplace. Br. in Opp. at 15. That distinction, however, does not justify a difference in result. A foreign state's refusal to permit a firm to conduct business within the state, no less than its expropriation of a firm's property, is an official act of state entitled to the protection of the Act of State Doctrine. In *Occidental Petroleum*, for example, the Act of State Doctrine was held to bar inquiry into why a foreign sovereign had terminated a right to conduct business within the state. *See* 331 F. Supp. 92, 99-101 (C.D. Cal. 1971).

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Buren Jackson Bradshaw
Rufus Wallingford
Jerry E. Smith
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151

Keith A. Jones
Fulbright & Jaworski
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800